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No. 95-1393

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

WILEMAN BROS. & ELLIOTT, INC., ET AL.,
CROSS-PETITIONERS

v.

DANIEL R. GLICKMAN, SECRETARY OF AGRICULTURE

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE SECRETARY OF AGRICULTURE IN OPPOSITION

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QUESTION PRESENTED

Whether the application of a "well-matured" standard of maturity for California peaches, nectarines, and plums from 1980 through 1987, pursuant to marketing orders issued by the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.*, violated the Administrative Procedure Act or was unconstitutionally vague.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a)[1] is reported at 58 F.3d 1367. The opinion of the district court (Pet. App. 40a-100a) is unreported. The opinions of the Judicial Officer of the Department of Agriculture are reported at 49 Agric. Dec. 705 and 50 Agric. Dec. 1165.[2]

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[1] All references to "Pet." and "Pet. App." refer to our petition for a writ of certiorari in No. 95-1184 and the appendix thereto.

[2] The Judicial Officer (JO) issued two decisions, one dismissing each of the administrative petitions that cross-petitioners, among others, filed in the administrative

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1995. A petition for rehearing was denied on September 18, 1995. Pet. App. 2a. On December 15, 1995, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including January 16, 1996. On January 11, 1996, Justice O'Connor further extended the time within which to file a petition to and including January 24, 1996, and the Secretary's petition was filed on that day and docketed on January 25, 1996. The cross-petition for a writ of certiorari was filed on February 26, 1996 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case arises from administrative petitions filed by cross-petitioners and others challenging certain provisions in the marketing orders for California peaches, nectarines, and plums issued by the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937 (AMAA or Act), 7 U.S.C. 601 *et seq.* On review of the Secretary's decisions dismissing the petitions, the Ninth Circuit sustained

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proceedings that led to the present case. Because of the length of the decisions and the fact that they are reported, we reproduced in the appendix to our petition in No. 95-1184 only that portion of the JO decision that addressed the First Amendment issue presented by our petition. Cross-petitioners have not reproduced any portion of either JO decision in the appendix to their conditional cross-petition. In the appendix to their brief in opposition to our petition, however, cross-petitioners have reproduced the decision of the Administrative Law Judge that was reversed by the JO in the decision reported at 50 Agric. Dec. 1165.

cross-petitioners' First Amendment challenge to the provisions in the marketing orders authorizing industry-funded generic advertising programs for those fruits. The Ninth Circuit rejected cross-petitioners' other challenges, however, including their challenge to the promulgation and administration of the maturity provisions in the marketing orders in effect from 1980 through 1987. In No. 95-1184, the Secretary has petitioned for a writ of certiorari to review the Ninth Circuit's holding on the First Amendment issue. Cross-petitioners seek further review of the Ninth Circuit's ruling on the fruit-maturity issue in the event that this Court grants the Secretary's petition.

Our petition in No. 95-1184 describes (at 4-14) the statutory and regulatory provisions and the course of the present litigation relevant to the First Amendment issue. We describe below the additional provisions and facts relevant to the fruit-maturity issue.

1. The AMAA authorizes the Secretary to include provisions in a marketing order regulating the "grade, size, or quality" of a commodity. 7 U.S.C. 608c(6)(A). Before 1980, the marketing orders for California peaches, nectarines, and plums required those fruits to meet grade "U.S. No. 1." Pet. App. 22a. Grade U.S. No. 1 is a term defined in regulations of the Secretary for use in a variety of regulatory contexts, including but not limited to AMAA marketing orders. See 7 U.S.C. 1622(c). As defined for nectarines, for example, U.S. No. 1 requires the fruit to be "mature but not soft or overripe * * * [with] [a]t least 75 percent of the nectarines in any lot [showing] some blushed or red color." 7 C.F.R. 51.3147.[3]

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[3] The definition of U.S. No. 1, as it relates to maturity, is similar for peaches and plums. 7 C.F.R. 51.1212; 51.1521.

In 1980, the Secretary amended the maturity provisions of the marketing orders by adding, after the preexisting language requiring the fruits to meet U.S. No. 1 grade, a proviso stating that "maturity shall be determined by the application of color standards by variety or such other tests as determined to be proper by the Federal or Federal-State Inspection Service" (a joint federal-state program for fruit inspection and grading). See Pet. App. 22a; 45 Fed. Reg. 32,308, 45,252 (1980) (nectarines); 45 Fed. Reg. 32,310, 44,917 (peaches); 45 Fed. Reg. 33,596, 47,115 (1980) (plums).[4] The administrative record accompanying the amendments stated that "provision is made for a higher maturity standard." *Id.* at 45,252 (nectarines); see also *id.* at 47,116 (plums). In the wake of the 1980 amendments, the committees

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Grade U.S. No. 1 also addresses other characteristics of fruits and vegetables, in addition to maturity. For example, U.S. No. 1 requires nectarines to be "free from decay, broken skins which are not healed, worms, [and] worm holes," and free from injury or damage caused by a wide variety of specific plant diseases, pests, and other conditions. 7 C.F.R. 51.3147.

[4] As amended in 1980, the maturity provision in the marketing order for nectarines, for example, provided:

> [N]o handler shall handle * * * [a]ny package or container of any variety of nectarines unless such nectarines meet the requirements of U.S. No. 1 grade: *Provided, That maturity shall be determined by the application of color standards by variety or such other tests as determined to be proper by the Federal or Federal-State Inspection Service.*

45 Fed. Reg. 45,253 (1980) (1980 amendment italicized). The text of the amended maturity provision for nectarines was similar to those for peaches and plums, and, in challenging those provisions, cross-petitioners have not distinguished among them. See Pet. App. 22a.

responsible for implementing the marketing orders applied a higher maturity standard that came to be known as the "well-matured" standard. See Pet. 5-6 (describing duties of commodity committees).

In 1988, the Secretary further amended the marketing orders expressly to provide for the "well-matured" standard of maturity. Pet. App. 22a; see 53 Fed. Reg. 19,226 and 19,232 (1988).

In 1992, the Secretary again amended the marketing orders by establishing a two-tiered standard for nectarines and peaches. 57 Fed. Reg. 20,735 and 42,681 (1992).[5] The minimum maturity standard is "mature," and handlers may voluntarily seek to earn the "well-matured" designation. Pet. App. 23a.

2. Cross-petitioners are handlers (*i.e.*, packers and distributors) of California peaches, nectarines, and plums. They and other handlers of those fruits filed administrative petitions with the Secretary pursuant to 7 U.S.C. 608c(15)(A) challenging, among other things, the maturity standards applied by the responsible committees under the marketing orders in effect from 1980 through 1987. Pet. App. 6a, 22a-27a. Reversing decisions by an administrative law judge in favor of the handlers, *id.* at 6a, the Judicial Officer (JO) of the Department of Agriculture ruled in favor of the Secretary on all issues, *id.* at 7a.

As relevant here, the JO rejected the handlers' contention that the 1980 amendment to the marketing orders did not change the maturity standard previously imposed under grade U.S. No. 1. 49 Agric. Dec.

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[5] The provisions in the marketing order applicable to plums ended in 1991, after a majority of plum producers failed to vote for its continuation in a periodic referendum. Pet. App. 5a n.1, 43a; 56 Fed. Reg. 23,773 (1991).

at 796-803; 50 Agric. Dec. at 1327-1328. The JO determined that the rulemaking record made clear that the Secretary in 1980 had intended "to establish a higher maturity standard for plums and nectarines than the U.S. No. 1 standard previously in effect." 49 Agric. Dec. at 798. The JO concluded that "the regulations should be construed to effectuate the Secretary's intent." *Ibid.*[6]

3. Cross-petitioners and other handlers filed this action in the United States District Court for the Eastern District of California under 7 U.S.C. 608c(15)(B), seeking judicial review of the JO's decisions. See Pet. 9-10. The district court held, *inter alia*, that their challenge to the promulgation and administration of the maturity regulations contained in the marketing orders in effect from 1980 through 1987 was moot in light of the Secretary's 1992 amendments to those regulations. Pet. App. 56a-58a.

4. The court of appeals held that the handlers' challenge to the fruit maturity regulations was not moot, because, in its view, if their challenge succeeded, they would be entitled to a refund of assessments used to administer those regulations. Pet. App. 23a-24a.

On the merits, the court of appeals rejected cross-petitioners' contention that the committees lacked authority to apply a "well-matured" standard under the marketing orders in effect from 1980 through 1987. Cross-petitioners based their contention chief-

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[6] In the second administrative decision, the JO explained that peaches, which were regulated in the same marketing order as plums, were also covered by this determination. 50 Agric. Dec. at 1328.

ly on the court's prior decision in *Wileman Bros. & Elliott, Inc.* v. *Giannini*, 909 F.2d 332, 336 (1990), which, as the court here described it, "held that tree fruit committee members had not acted in accord with the marketing orders in promulgating the heightened maturity standards in 1980 and thus were not immune from suit in an antitrust action brought by several handlers." Pet. App. 24a. The court observed that *Giannini* was "primarily concerned with the issue of immunity from an antitrust suit." *Id.* at 25a. The court also observed that *Giannini* "was decided in the context of an appeal of a Rule 12(b)(6) dismissal for failure to state a claim." *Ibid.* In that context, the court explained, "[t]he *Giannini* court could not resolve the ambiguity it found in the regulation promulgated by the Secretary and had to hold in favor of the plaintiffs." *Ibid.* In the present context, however, the court determined from the administrative record that "it is clear that the Secretary intended to raise the maturity standards and to allow the committees to promulgate the implementing regulations, just as they had with numerous standards in the past." *Ibid.*

The court of appeals also rejected cross-petitioners' contention that the heightened maturity standard was not supported by substantial evidence. Pet. App. 26a n.12.

ARGUMENT

1. Although cross-petitioners prevailed in the court of appeals on the First Amendment issue, they argue that, in addressing that issue, the court did not apply a stringent enough standard of review. Cross-Pet. 10-20. That argument provides no basis for granting their conditional cross-petition. This Court

"reviews judgments, not statements in opinions." *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956). Because cross-petitioners prevailed on the judgment as to the First Amendment issue, they are not entitled to petition for a writ of certiorari on that issue, at least in the absence of extraordinary circumstances, which are not claimed to exist here. See Robert L. Stern, et al., *Supreme Court Practice* § 2.4, at 45 (7th ed. 1993). Moreover, if this Court grants the Secretary's petition in No. 95-1184, cross-petitioners may advance their arguments for a more stringent standard of review in support of the judgment below on the First Amendment issue. See, *e.g.*, *Schweiker* v. *Hogan*, 457 U.S. 569, 585 n.24 (1982); *Hankerson* v. *North Carolina*, 432 U.S. 233, 240 n.6 (1977). Because our position on the First Amendment issue is set forth in our certiorari petition (at 14-30), we do not address it further here.

2. Cross-petitioners contend (Cross-Pet. 20-30) that the responsible committees lacked authority to apply a "well-matured" standard under the marketing orders in effect from 1980 through 1987.[7] They base that contention on their view that the maturity

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[7] The court of appeals concluded that cross-petitioners' challenge to the "well-matured" standard was not moot because cross-petitioners might be entitled to a refund of assessments used to pay for the administration of the standard from 1980 through 1987 if their challenge was successful. Pet. App. 23a-24a. As we argued below, cross-petitioners would not be entitled to a refund if they prevailed on their challenge. See Gov't C.A. Br. 43-48. However, as we acknowledged below, cross-petitioners' challenge is not moot for another reason—namely, that the Secretary could return to the pre-1988 regime, so that the issue would be capable of repetition yet evading review. *Id.* at 30-31.

provisions in the marketing orders for those years cannot be read to have increased the maturity standard previously in effect. Cross-petitioners argue that the assertedly unauthorized application of the "well-matured" standard violated the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, and the doctrine of unconstitutional vagueness.

The proper interpretation of the marketing orders for California peaches, nectarines, and plums that were in effect from 1980 through 1987 does not present an issue of broad legal importance. Nor does it have continuing importance, since, as noted above, the Secretary amended the marketing orders in 1988 explicitly to adopt the "well-matured" standard and again in 1992 to make compliance with that standard voluntary. Cf. *District of Columbia* v. *Sweeney*, 310 U.S. 631 (1940) (certiorari denied because statute at issue had been repealed and question presented was "therefore not of public importance"). In any event, cross-petitioners' challenge is without merit.

In arguing that the 1980 amendment to the marketing orders did not change the "U.S. No. 1" grade previously in effect, cross-petitioners accord no effect to the language of the amendment. See note 4, *supra*. Their argument is therefore at odds with well-settled principles of interpretation. See, *e.g*, *Bailey* v. *United States*, 116 S. Ct. 501, 507 (1995) (citing *Platt* v. *Union Pacific R.R.*, 99 U.S. 48, 58 (1879)); *Gustafson* v. *Alloyd Co.*, 115 S. Ct. 1061 1069 (1995); *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 2407, 2413 (995). Moreover, as noted above, the grade "U.S. No. 1" governs not only fruit maturity, but also other characteristics of fruit. See note 3, *supra*. In contrast, the 1980 amendment exclusively addressed the issue of fruit

maturity. That makes cross-petitioners' insistence that the proviso simply re-expressed the U.S. No. 1 standard of maturity particularly unpersuasive.

Thus, contrary to cross-petitioners' contention (Cross-Pet. 21), the text of the marketing orders was not so "plain" that the court of appeals was confined to the "four corners" of the orders in reviewing cross-petitioners' challenge to the application of the "well-matured" standard.[8] Instead, the court properly reviewed the administrative record, and it correctly found support there for the Secretary's view that the orders authorized the "well-matured" standard. See 45 Fed. Reg. 45,252 (1980) ("Under the amendment, California fresh nectarine shipments are required to grade at least U.S. No. 1, except that provision is made for a higher maturity standard based on color standards by variety or other specified tests."). The court's decision upholding the Secretary's view comports with decisions of this Court that accord considerable deference to an agency's interpretation of its own regulations, see, *e.g.*, *Thomas Jefferson Univ.* v. *Shalala*, 114 S. Ct. 2381, 2386 (1994); *Stinson* v. *United States*, 113 S. Ct. 1913, 1919 (1993); *Martin* v. *OSHRC*, 499 U.S. 144, 150-151 (1991), especially where, as here, that interpretation was contemporaneous with the regulations and has been consistently followed. See *Davis* v. *United States*, 495 U.S.

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[8] Indeed, even in *Wileman Bros. & Elliott, Inc.* v. *Giannini*, 909 F.2d 332, 335-336 (1990), upon which cross-petitioners rely (see note 9, *infra*), the Ninth Circuit observed that "[t]his new [1980] language governing standards and tests is ambiguous as to whether the maturity standards themselves were being or would subsequently be modified and, if so, by whom."

472, 484 (1990); see also *Good Samaritan Hosp.* v. *Shalala*, 113 S. Ct. 2151, 2159 (1993).[9]

Cross-petitioners err in contending (Cross-Pet. 25-26) that the 1980-1987 maturity provisions were unconstitutionally vague because they gave inadequate notice of conduct (*i.e.*, violation of the marketing orders) that was subject to criminal penalties. The fact that the maturity provisions were amended in 1980 signalled a change in the prior maturity standard, and the setting in which that change occurred made clear that the change took the form of a heightening of the standard. Moreover, the actual color standards applicable to each variety of nectarine, peach, and plum were well-publicized. They were announced each season and published by the marketing committees in bulletins distributed to all members of the industry. Indeed, cross-petitioners admit that the bulletin announcing the new maturity standard for nectarines was "supplied to all growers and handlers of nectarines" and that it explicitly stated that the fruit was required to meet the "well-matured" standard. Cross-Pet. 6. As quoted by cross-petitioners, that bulletin eliminated any doubt about whether the 1980 marketing orders raised the maturity standard by explaining that "[t]his maturity requirement is more advanced than the maturity requirement of the U.S. No. 1 grade." *Ibid.* In those

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[9] Cross-petitioners contend that the Ninth Circuit's decision below conflicts with its prior decision in *Wileman Bros. & Elliott, Inc.* v. *Giannini*, *supra*. The Ninth Circuit, however, is the best authority on the proper reading of its precedent, cf. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam), and it explained in the present case that there is no such conflict, Pet. App. 25a.

circumstances, cross-petitioners had fair notice of the maturity standard.

CONCLUSION

The conditional cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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